

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3 SUMMARY ORDER

4 THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER
5 AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER
6 COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER
7 COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN
8 ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

9 At a stated term of the United States Court of Appeals for the
10 Second Circuit, held at the Thurgood Marshall United States
11 Courthouse, Foley Square, in the City of New York, on the 14th day
12 of August, two thousand and six.

13 PRESENT:

14 HON. ROBERT D. SACK,
15 HON. ROBERT A. KATZMANN,
16 Circuit Judges,
17

18 HON. J. GARVAN MURTHA,*
19 District Judge.

20 -----
21 ERIC RUBIN-SCHNEIDERMAN,
22 Plaintiff-Appellant,

23 - v -

No. 05-5851

24 MERIT BEHAVIORAL CARE CORPORATION, SATI AHLUWALIA, EMPIRE BLUE
25 CROSS and BLUE SHIELD,

26 Defendants-Appellees.
27 -----

* Of the United States District Court for the District of Vermont, sitting by designation.

1 Appearing for Appellant: WHITNEY NORTH SEYMOUR, JR., New
 York, NY.

2 Appearing for Appellees Merit JONATHAN K. COOPERMAN, Kelley,
3 Behavioral Care Corporation Drye & Warren (Jennifer A.
4 and Sati Ahluwalia: Huber, of counsel), New York,
 NY.

5 Appearing for Appellee DALY D.E. TEMCHINE, Epstein
6 Empire Blue Cross and Blue Becker & Greene, P.C., New
7 Shield: York, NY.

8 Appeal from the United States District Court for the
9 Southern District of New York (Alvin K. Hellerstein, Judge).

10 UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED
11 AND DECREED that the judgment be, and it hereby is, AFFIRMED.

12 The plaintiff, Eric Rubin-Schneiderman, brought suit
13 against the defendants -- Empire Blue Cross and Blue Shield
14 ("Empire"), his health insurance company; Merit Behavioral Care
15 Corporation ("Merit"), the company that performs utilization
16 review of mental health services for Empire; and Sati Ahluwalia,
17 an employee of Merit -- under section 502(a)(3) of the Employee
18 Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(a)(3).
19 He alleged that the defendants negligently failed to authorize
20 his hospitalization in a psychiatric facility and that, as a
21 result of this negligence, he suffered permanent injury from a
22 failed suicide attempt. The district court granted the
23 defendants' motion to dismiss under Federal Rule of Civil
24 Procedure 12(b)(6) on the ground that, under recent Supreme Court
25 precedents beginning with Mertens v. Hewitt Assocs., 508 U.S. 248
26 (1993), the monetary damages Rubin-Schneiderman sought were
27 unavailable under ERISA § 502(a)(3). **[SPA 3-6]**

28 Rubin-Schneiderman's primary argument on appeal is that
29 Mertens was wrongly decided and we should not follow it. But
30 "[w]e cannot overrule the Supreme Court." Bach v. Pataki, 408
31 F.3d 75, 86 (2d Cir. 2005); see also Rodriguez de Quijas v.
32 Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989); Cicio v.
33 Does, 321 F.3d 83, 106-07 (2d Cir. 2003) (Calabresi, J.,
34 dissenting in part), vacated and remanded, 542 U.S. 933 (2004).
35 Mertens and its progeny are binding on us and we are obliged to
36 follow those decisions. See, e.g., Coan v. Kaufman, --- F.3d
37 ---, 2006 WL 2075129, at *10, 2006 U.S. App. LEXIS 18444, at *33
38 (2d Cir. July 21, 2006).

39 Rubin-Schneiderman also urges us to adopt Justice

1 Ginsburg's suggestion in Aetna Health Inc. v. Davila, 542 U.S.
2 200 (2004), that monetary relief under section 502(a)(3) may be
3 more widely available in suits against ERISA fiduciaries than
4 against non-fiduciaries. See id. at 223-24 (Ginsburg, J.,
5 concurring). As we recently concluded, however, the fact that a
6 defendant is a fiduciary does not change the requirement of
7 section 502(a)(3) that the relief sought be "equitable." See
8 Coan, 2006 WL 2075129, at *11, 2006 U.S. App. LEXIS 18444, at
9 *36-*37; Sereboff v. Mid Atlantic Med. Servs., Inc., --- U.S.
10 ----, 126 S.Ct. 1869, 1874 (2006). Because Rubin-Schneiderman is
11 seeking compensatory monetary damages, a legal remedy, he cannot
12 proceed under ERISA § 502(a)(3).

13 For the foregoing reasons, the judgment of the District
14 Court is hereby AFFIRMED.

15 FOR THE COURT:
16 ROSEANN B. MACKECHNIE, Clerk

17
18 By: _____